Supreme Court, U. S.
FILED
SEP 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 78-1943

HOWARD KEITH THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of North Carolina
THOMAS F. MOFFITT
Assistant Attorney General
LUCIEN CAPONE III
Associate Attorney General
Counsel for the State of North Carolina,
Respondent

Justice Building
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-6026

DI CESARE - Printing — 331-4141 — Washington, D.C. 20004

INDEX

PAGE

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED ... 2

STATEMENT OF THE CASE 3

REASONS FOR REFUSING TO ISSUE A WRIT OF CERTIORARI 5

CONCLUSION 9

TABLE OF CASES

PAGE

Adams v. Williams, 407 U.S. 143 (1972) 6

Almeida—Sanchez v. United States, 413 U.S. 266 (1973) 6

Brown v. Texas, 99 S. Ct. 2637 (1979) 6, 8

Coolidge v. New Hampshire, 403 U.S. 443, *reh. denied*, 404 U.S. 874 (1971) 5

Delaware v. Prouse, 99 S. Ct. 1391 (1979) 6, 8

Dunaway v. New York, 99 S. Ct. 2248 (1979) 6

Katz v. United States, 389 U.S. 347 (1967) 5

Terry v. Ohio, 392 U.S. 1 (1968) 6, 8

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 6, 8

United States v. Hall, 525 F.2d 857, (D.C. Cir. 1976) 7

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 78-1943

HOWARD KEITH THOMPSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the North Carolina Supreme Court is reported at 296 N.C. 703, 252 S.E. 2d 776 and is appended to the petition.

The opinion of the North Carolina Court of Appeals is reported at 37 N.C. App. 628, 246 S.E. 2d 827 and is also appended to the petition.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where a police officer has heard official reports that several break—ins have been comitted in an area and that a particular kind of vehicle was involved, and the officer subsequently observes such a vehicle parked in an isolated place in the vicinity at a late hour and where several persons are observed in and around the vehicle, does the minimal intrusion occasioned by the officer's request for identification and his act of reaching into the vehicle to retrieve that identification violate the Fourth Amendment's proscription against unreasonable seizures?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...Nor shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On August 22, 1977, petitioner was tried in the Superior Court of New Hanover County, North Carolina, on the charge of felonious possession of a controlled substance (hashish). During the trial, petitioner objected to introduction of the hashish asserting that it had been seized in violation of the Fourth Amendment's proscription against unreasonable searches and seizures as made applicable to the states by the Fourteenth Amendment. After conducting a *voir dire* hearing the trial court allowed the hashish to be introduced into evidence. Petitioner was convicted and was sentenced to 18 months imprisonment. The conviction was affirmed on appeal by both the North Carolina Court of Appeals with one dissent and the North Carolina Supreme Court, also with one dissent, those courts having held that the seizure was justified under the "plain view doctrine."

During the early morning hours (12:30 a.m.) of April 17, 1977, officers William Wolak and W.A. Lee of the New Hanover County Sheriff's Department, Narcotics Bureau were on routine patrol on Highway 421 which ends at a parking lot and boat ramp adjacent to historic Fort Fisher. Wolak and Lee pulled their unmarked car into the lot and saw a van and motorcycle parked near the water. There

were no other vehicles in the area. Shortly after Wolak and Lee parked their car, the van and motorcycle moved a distance of 35 to 40 yards and parked again. The officers watched the vehicle for a short time. The passenger door of the van, which was facing the officers, was wide open, as was the side door. The interior lights were on. Six people were observed in and around the van.

Earlier in the evening, Wolak and Lee had heard reports from the Sheriff's department that several break-ins had occurred in that area. The reports tied the break-ins to a van. Wolak knew that people camped at Fort Fisher and that the Azalea Festival was taking place. Wolak, an officer of eleven years experience, testified that the van and motorcycle were in a very suspicious location for that hour of the night. Believing, therefore, that the situation warranted some inquiry, Wolak and Lee drove up to the van. Officer Wolak got out of the car and walked over to the van, approaching the passenger side. Two persons were seated in the front seat and four were in the back. The passenger and side doors remained open. Wolak identified himself as a law enforcement officer and asked the person seated in the front passenger seat, later identified as petitioner, for identification. Wolak took petitioner's identification and requested that he step from the van. Petitioner did so. Wolak then asked the person seated in the driver's seat for his identification. Wolak leaned across the empty passenger seat to get the identification as the driver was pulling it from his pocket. In doing this, Wolak noticed several tinfoil packets lying on an open shelf under the dashboard in front of the passenger's seat. One of the packets was open, exposing a brittle brown substance which Wolak recognized from experience as hashish. The packets were seized

and petitioner and the other occupants of the van were placed under arrest. As this was happening, petitioner said, "The stuff is mine. I don't want to get anybody else in trouble."

REASONS FOR REFUSING TO ISSUE A WRIT OF CERTIORARI

The "plain view doctrine" provides that where a law enforcement officer inadvertently comes across contraband in plain view during the course of a prior valid intrusion the seizure of that contraband is not prohibited by the Fourth Amendment. *Coolidge v. New Hampshire,* 403 U.S. 443, 466, *reh. denied,* 404 U.S. 874 (1971).

Petitioner does not deny that the van was parked in a public place, that the doors were wide open, that the interior lights were on exposing the inside to any who might pass by or that the hashish lay in an open tinfoil packet on an open shelf of the dashboard on the passenger side. Of course, what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. *Katz v. United States,* 389 U.S. 347, 351 (1967).

Petitioner contends, however, that Officer Wolak obtained his view of the contraband by virtue of an invalid intrusion. He asserts that Officer Wolak's request for identification and the act of reaching across the passenger seat to retrieve that identification amounted to a "seizure" which was not predicated upon a "reasonable suspicion" that petitioner might be engaged in or connected with criminal activity.

Assuming that Officer Wolak's acts did constitute a seizure of petitioner, the Fourth Amendment requires a determination of whether that seizure was reasonable. The analysis "[I]s a dual one-whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio,* 392 U.S. 1, 20 (1968).

In making that analysis, a balancing test is employed which weighs the gravity of the public interest in crime detection and prevention served by the seizure against the severity of the interference with the individual's right to privacy. *Brown v. Texas,* 99 S. Ct. 2637, 2640 (1979). In practice, this balance has been struck along a continuum ranging from seizures akin to a traditional arrest, *Dunaway v. New York,* 99 S. Ct. 2248 (1979) or involving a stop and full search, *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), in which case probable cause is required, to routine vehicle stops at a fixed checkpoint for brief questions regarding illegal aliens, in which case no probable cause or reasonable suspicion to believe a crime has or is occurring is required. *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976). In between those extremes lie cases involving a brief stop, short of a traditional arrest for the purpose of investigating possible criminal involvement. *See, e.g. Brown v. Texas,* 99 S. Ct. 2637 (1979); *Delaware v. Prouse,* 99 S. Ct. 1391 (1979); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *Adams v. Williams,* 407 U.S. 143 (1972); *Terry v. Ohio,* 392 U.S. 1 (1968). Because of the limited nature of the intrusion in those situations, probable cause is not required. Instead, the balance is struck by requiring the officer to point to the specific and articulable

facts which taken together with rational inferences from those facts created a *reasonable suspicion* that the individual he detained may have been engaged in criminal activity. What constitutes a reasonable suspicion differs from case to case depending on the peculiar set of facts and circumstances.

In the case *sub-judice* the intrusion upon petitioner's right to privacy was minimal. The van in which petitioner was seated was parked in a public place with its doors wide open and its interior lights shining. Officer Wolak simply approached petitioner in this public place, asked for his identification and requested that petitioner step from the van. Petitioner voluntarily complied. There was no frisk until after the contraband had been seen in plain view and the arrest effected. Wolak did not draw a gun or threaten petitioner in any way. On the other hand the hour was late. There had been official reports of several break—ins in the vicinity involving a van. The van was parked in an isolated location which was otherwise deserted. Office Wolak, an experienced policeman, considered the location of the van as suspicious for that hour of the night. Several people were observed in and around the van. The van moved about 40 yards after Wolak and Lee pulled their unmarked car into the parking lot. While any one of those facts in isolation might not be a sufficient basis for inquiry, when viewed holistically, as they were, "[T]hrough the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training," *United States v. Hall,* 525 F.2d 857, 859 (D.C. Cir. 1976), investigation was clearly justified if not demanded.

Petitioner nevertheless argues that these facts were not sufficiently "individualized" to focus suspicion on him and

the particular van in which he was seated. However, if Officer Wolak's information had been any more specific, (e.g., a license number) he would have undoubtedly had probable cause to make an arrest. What this Court has consistently disapproved in cases such as *Brown v. Texas, Delaware v. Prouse*, and *Brignoni-Ponce*, is the complely random stop of individuals or a vehicle without any reason to suspect that a crime has been or is being committed or that the person stopped may have committed it. However, in disapproving such stops this Court did not impose a probable cause requirement on field investigations. *Terry v. Ohio,* 392 U.S. 1, 22 (1968). Rather, where, as here, police have reports that a crime has been committed and that a particular kind of vehicle was involved, a brief investigation of such a vehicle and its occupants found parked at an isolated place in the vicinity, at a late hour is certainly reasonable especially when the investigation is limited to the request for identification.

Nor was Wolak's act of leaning into the van from his position on the passenger side to retrieve the driver's identification a violation of the Fourth Amendment. On the contrary it was a reasonable act limited in scope to the circumstances which justified the request for identification in the first place. Additionally, the fact that the van doors were wide open belies any reasonable expectation of privacy in the interior exposed to plain view.

CONCLUSION

Petitioner has shown no basis for the issuance of a writ of certiorari and his application should, therefore, be denied.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General of North Carolina

THOMAS F. MOFFITT
Assistant Attorney General

LUCIEN CAPONE III
Associate Attorney General

Justice Building
P.O. Box 629
Raleigh, North Carolina 27602
Telephone (919) 733-6026

CERTIFICATE

I Lucien Capone, III, one of the attorneys for the Respondent, hereby certify that I have served a copy of the foregoing Brief of Respondent, State of North Carolina, in opposition to Petitioner for Writ Certiorari, on counsel for the Petitioner, in the case of HOWARD KEITH THOMPSON V. STATE OF NORTH CAROLINA (No. 78-1943), by depositing a copy of the same in the United States Mails in a postage pre-paid wrapper addressed as follows:

Mr. Steven A. Bernholz
Coleman, Bernholz & Dickerson
Attorneys at Law
Suite 20
Franklin Building
137 East Franklin Street
Chapel Hill, NC 27514

Mr. Barry Nakell
Attorney at Law
1310 LeClain Street
Chapel Hill, NC 27514

This the 14th day of September, 1979.

LUCIEN CAPONE, III
Associate Attorney General